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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 889

KENNETH L. HARDY, ET AL., *Petitioners*,

v.

ROLAND E. MATTHEWS, JR., *Respondent*.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on August 29, 1969.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals has not yet been reported and is set forth in Appendix A at pages 1a through 18a. The District Court rendered no opinion but its order entering summary judgment in favor of petitioners is set forth in Appendix B at page 1b.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 29, 1969 (Appendix C). Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Whether due process and equal protection considerations prohibit the hospitalization and treatment of a prison inmate for a mental illness without first affording him the procedural safeguards, including a judicial hearing with trial by jury and appointed counsel, afforded non-inmates by the 1964 Hospitalization of the Mentally Ill Act, *infra*.

STATUTE INVOLVED

District of Columbia Code, 1967 edition, § 24-302.

> "§ 24-302. *Commitment of mentally ill person while serving sentence.*
>
> "Any person while serving sentence of any court of the District of Columbia for crime, in a District of Columbia penal institution, and who, in the opinion of the Director of the Department of Corrections of the District of Columbia, is mentally ill; shall be referred by such Director to the psychiatrist functioning under section 24-106, and if such psychiatrist certifies that the person is mentally ill, this shall be sufficient to authorize the Director to transfer such person to a hospital for the mentally ill to receive care and treatment during the continuance of his mental illness. (Mar. 3, 1901, 31 Stat. 1340, ch. 854, § 928; Aug. 9, 1955, 69 Stat. 611, ch. 673, § 2.)"

STATEMENT OF THE CASE

Following his conviction in the United States District Court for the District of Columbia of manslaughter, respondent, in October 1965, commenced serving a sentence of 4 to 14 years at the District of Columbia Reformatory at Lorton, Virginia. In March 1967, respondent was examined by a psychiatrist who certified that he was suffering from a mental illness necessitating hospital treatment. Pursuant to § 24-302, D. C. Code, 1967, respondent was then transferred from the reformatory to St. Elizabeths

Hospital to receive care and treatment for his mental illness.

In June 1967, respondent *pro se* filed in the United States District Court for the District of Columbia a complaint challenging the legality of his transfer to St. Elizabeths Hospital. Summary judgment was entered against him and he appealed to the United States Court of Appeals for the District of Columbia Circuit, which remanded the case to the District Court because of procedural considerations not here involved. Upon remand, the District Court appointed an attorney to represent respondent and on May 8, 1968, counsel filed an amended complaint. In the meantime, respondent had been returned to the District of Columbia Reformatory.

In the amended complaint, respondent challenged his transfer to St. Elizabeths as unconstitutional on the ground that no judicial hearing was afforded him prior to his transfer. Respondent made certain additional allegations not here pertinent and requested the District Court to issue an injunction against any future transfers to St. Elizabeths Hospital without first affording him a judicial hearing. Summary judgment was entered against respondent on the amended complaint and he again appealed to the United States Court of Appeals for the District of Columbia Circuit.

On June 4, 1969, at oral argument before the United States Court of Appeals for the District of Columbia Circuit, counsel for respondent represented that, following the ruling of the District Court, respondent was again transferred to St. Elizabeths and at some later time transferred to a federal mental hospital in Missouri. Counsel further represented that, prior to oral argument, respondent had been transferred back to the District of Columbia Reformatory.

On August 29, 1969, the United States Court of Appeals for the District of Columbia Circuit, with Judge Wilbur

K. Miller, dissenting, held that respondent's hospitalization, although in strict accord with § 24-302, D. C. Code, 1967, was nevertheless unlawful because he was not afforded the procedural safeguards, including a judicial hearing with trial by jury and appointed counsel, provided by the 1964 Hospitalization of the Mentally Ill Act, P. L. 89-183, 79 Stat. 750, § 21-501 *et seq.*, D. C. Code, 1967. The court's holding was based on its conclusion that, unless § 24-302, *supra*, is construed to embrace such procedural safeguards, an inmate hospitalized and treated for mental illness during the duration of his sentence will be denied equal protection of law.

REASONS FOR GRANTING THE WRIT

The principal reason why this Court should exercise its certiorari jurisdiction to review the decision of the United States Court of Appeals for the District of Columbia Circuit is that the ruling below, while in general accord with a recent decision of the Second Circuit, is in direct conflict with the decisions of two other circuit courts of appeals.

Reduced to its bare essentials, the holding of the United States Court of Appeals for the District of Columbia Circuit is that a prison inmate suffering from a mental illness cannot be hospitalized in a mental institution during an unexpired portion of his sentence unless he is first afforded the procedural protections applicable to non-inmates committed under the 1964 Hospitalization of the Mentally Illness Act, P. L. 89-183, 79 Stat. 750, § 21-501 et seq., D. C. Code, 1967.[1] Thus, prisoners now hospitalized in mental institutions in the District of Columbia must be given a judicial hearing with a right to trial by jury and appointed

[1] The 1964 Act, designed as it is to effect the commitment of a mentally ill person "likely to injure himself or other persons if allowed to remain at liberty," would by its very nature appear to be inapplicable to a prisoner who has already lost his "liberty." See § 21-545, D. C. Code, 1967.

counsel, or promptly returned to a penal institution. In holding that, unless § 24-302, D. C. Code, 1967, is construed to require these procedures,[2] there would be a denial of equal protection, the court below stressed three factors (Appendix A, 6a, 7a):

> "First, * * * there is a stigma attached to the mentally ill which is different from that attached to the criminal class in general."
>
> "Second, there are numerous restrictions and routines in a mental hospital which differ significantly from those in a prison."
>
> "Third, there is a definite *possibility* that transfer to St. Elizabeths hospital *might* result in a prisoner being incarcerated for a longer time than if he remained at Lorton" [emphasis added] and thus adversely affect his parole potential.

Reaching a completely different result in *Darey* v. *Sandritter*, 355 F. 2d 22, 23 (1965), the Ninth Circuit stated:

> "It is not appellant's hospitalization which deprives him of his liberty. The deprivation stems from the judgment of conviction and the sentence of confinement. The hospitalization does not result from a separate order or judgment which is independent of the penal judgment and might extend a legally imposed term of restraint. Whether a prisoner, during his lawful term, should or should not receive medical treatment in suitable environs must ordinarily be determined by custodial authorities in the proper exercise of a sound discretion. See Urban v. Settle, 298 F. 2d 592, 593 (8th Cir., 1962); Higgins v. United States, 205 F. 2d

[2] To thus construe § 24-302 is to emasculate it. This provision is not a part of a statutory scheme designed to provide for commitment and treatment of the mentally ill. Its origin may be traced to the "Criminal Procedure Chapter" of the 1901 "Act to establish a code of laws for the District of Columbia." Sec. 31 Stat. 1189, 1337, 1340. And from the most cursory perusal of § 24-302, it is plain that its clarity and preciseness make it impossible to expand its terms to contain the ideas embodied in the 1964 Act without a substantial rewriting. It is, of course, not the role of the judiciary to undertake this kind of draftsmanship. See *Aptheker v. Secretary of State*, 378 U. S. 500, 515, 516 (1964); *United States v. Robel*, 389 U. S. 258, 262 (1967).

650, 653 (9th Cir., 1953); Wells v. Attorney General, 201 F. 2d 556, 559 (10th Cir., 1953); Jones v. Pescor, 169 F. 2d 853, 856 (8th Cir., 1948); Estabrook v. King, 119 F. 2d 607, 609-610 (8th Cir., 1941). See also People v. Trippell, 20 Cal. App. 2d 386, 67 P. 2d 111 (1937). * * *"

And in construing the enactment relating to the hospitalization and treatment of federal prisoners (18 U. S. C. § 4241) and its statutory predecessor (18 U. S. C. § 876), the Eighth Circuit has held, in an unbroken line of decisions, that the failure to give a prisoner a judicial hearing before hospitalizing him for treatment of his mental illness during an unexpired portion of his sentence gives rise to no constitutional problems. See *Douglas* v. *King*, 110 F. 2d 911 (1940); *Estabrook* v. *King*, 119 F. 2d 607 (1944); *Jones* v. *Pescor*, 169 F. 2d 853 (1948); *Rosheisen* v. *Steele*, 193 F. 2d 273 (1951); *Urban* v. *Settle*, 298 F. 2d 592 (1962); *Jones* v. *Harris*, 339 F. 2d 585 (1964); compare *Holland* v. *Ciccone*, 386 F. 2d 825 (1967).

In *Jones* v. *Pescor*, *supra*, the Court said (169 F. 2d at 856):

"* * * As to the contention that appellant's transfer to and confinement in the U. S. Medical Center were illegal and violative of due process, because he was not given a hearing on his need for such care and treatment, we have previously held that the determination of a prisoner's mental condition and need for treatment, pursuant to 18 U. S. C. A. § 876 and without judicial trial, does 'no violence to his constitutional rights.' Douglas v. King, 8 Cir., 110 F. 2d 911, 913. And again, we have said that Congress undeniably has the power to make such provision for the medical care and treatment of federal prisoners and to set up such administrative machinery for determining a prisoner's need for care and treatment and the nature thereof, without the right to a formal hearing, as it deems advisable. Estabrook v. King, 8 Cir., 119 F. 2d 607, 609, 610."

On the other hand, in *United States ex rel. Schuster* v. *Herold*, 410 F. 2d 1071, (2nd Cir., 1969), cited and relied upon by the court below, the Second Circuit, with Judge Moore dissenting, held that equal protection considerations preclude the transfer of a prisoner from a jail to a mental institution during an unexpired portion of his sentence unless the prisoner is, as a condition precedent, afforded "substantially the same safeguards afforded non-prisoners before commitment" (410 F. 2d at 1084). In ruling as it did, the court stressed that the prisoner involved was ineligible for parole consideration as long as he remained confined in a mental hospital. See 410 F. 2d at 1073, 1076, 1080.

A decidedly more liberal policy of the District of Columbia Board of Parole sharply distinguishes the instant case from *Schuster* on its facts. It is significant in this regard that the District of Columbia Board of Parole has regularly conducted hearings and considered for parole hospitalized prisoners undergoing treatment for mental illness, and has in fact paroled prisoners thus situated in the past. Moreover, the United States District Court for the District of Columbia regularly entertains, as often as every six months, petitions for writs of habeas corpus by patients at St. Elizabeths Hospital, including those hospitalized under § 24-302, *supra*. In so doing, the court accords the patient a hearing with appointed counsel and, if justified, an independent psychiatric examination.

The availability to inmates in this jurisdiction of the aforementioned procedural safeguards effectively lays to rest any equal protection difficulties which might otherwise arguably be present. The existence of such safeguards makes it clear that the court's ruling is antithetical to the established and oft-repeated proposition that matters of prison administration and security properly fall within the discretion of prison officials, and, except in extreme cases, are not subject to judicial interference. See, for

example, *Smith* v. *Schneckloth*, 414 F. 2d 680 (9th Cir., 1969), and cases cited therein at 681.

Manifestly, neither the ruling of the court below nor that of the Second Circuit will find justification in the holding of this Court in *Baxstrom* v. *Herold*, 383 U. S. 107 (1966), wherein the Court held merely that, once a prison inmate's sentence has *expired*, he may not be hospitalized in a mental institution without the judicial review afforded non-inmates civilly committed. There is not the slightest suggestion in *Baxstrom* that equal protection considerations preclude prison authorities from exercising their administrative discretion to hospitalize and treat a mentally ill inmate during an *unexpired* portion of his sentence.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the severe adverse impact of the ruling in the instant case upon the administration of the District of Columbia and federal prison systems and its clear conflict with the holdings of other circuit courts of appeals fully warrants, indeed compels, review by the Supreme Court of the United States. The petition for a writ of certiorari should, accordingly, be granted.

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